IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

FRIDAY, THE 26TH OCTOBER 2007 / 4TH KARTHIKA 1929

Crl.MC.No. 3218 of 2007()

ST.936/2006 of JUDL.MAGISTRATE OF FIRST CLASS, PALA

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PETITIONER:

GIRIJA B.G., W/O. T.R.SANTHOSH,
VELLAPPALLIL HOUSE, PALA, MEENACHIL VILLAGE.

BY ADV. SRI.P.BABU KUMAR

RESPONDENTS:

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1. STATE OF KERALA, REP. BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

2. AGUSTHI CHERIAN, S/O. AGASTHY,
KURISUMOOTTIL HOUSE, CHAKKAMPPUZHA P.O.,
VELLILAPPILLI VILLAGE.

R1 BY PUBLIC PROSECUTOR SRI. GIKKU JACOB

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 26/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

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Crl.M.C.No. 3218 of 2007

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Dated this the 26th day of October, 2007

O R D E R

Can the conditional tender of the Demand Draft for the cheque amount made by the petitioner in this case be reckoned as "payment of the said amount of money" contemplated under proviso (c) to Section 138 of the N.I. Act? That is the short question that arises for consideration in this Crl.M.C.

2. That a cheque for Rs.82,983/- was issued by the petitioner to the complainant is not virtually disputed. The cheque was dishonoured. The complainant made a demand. In reply to the demand, the petitioner informed the complainant that she is willing to pay the amount on condition that the complainant does not make any other demand. According to the petitioner, in the notice, while making the demand, the complainant had asserted that the cheque was paid towards larger amounts due to the complainant by the petitioner.

3. The amount was not actually paid or tendered. However, the petitioner chose to file a civil suit subsequently, in which she

produced a demand draft for the said amount of Rs.82,983/- Copy of the plaint has been produced as Annex.A3, in which also there is no payment or unconditional tender of the amount covered by the cheque.

4. The learned counsel for the petitioner submits that the petitioner has satisfied the requirement of the proviso (c) to Section 138 of the N.I. Act and therefore the prosecution is liable to be quashed.

5. I am unable to agree. To avoid a prosecution under Section 138 of the N.I. Act, the drawer of the cheque is given an opportunity "to make the payment of the cheque amount" to the payee or the holder in due course. It is for the drawer to actually make the payment to avoid a prosecution under Section 138 of the Act. Of course, there may be situations, where tender of the amount can be equated to payment. In such cases, the drawer will certainly be entitled to contend that the tender must be reckoned as sufficient payment contemplated under the proviso (c).

6. In the facts and circumstances of this case, it is absolutely clear that there was no payment or unconditional tender as to justify a contention at this stage that payment had been made under proviso (c) to justify

invocation of the extra ordinary inherent jurisdiction under Section 482 Cr.P.C.

7. I am, in these circumstances satisfied that this Crl.M.C. deserves to be and it is hereby dismissed. I may hasten to observe that I have not intended to foreclose the right of the petitioner to raise all necessary and appropriate contentions before the learned Magistrate.

8. The learned counsel then contends that without any dispute the petitioner has taken a demand draft for the amount covered by the cheque and has placed it before the civil court in the plaint that is filed by her. In these circumstances the petitioner may be permitted to appear through counsel and raise her plea, it is prayed.

9. It is for the petitioner to make appropriate application under Section 205 Cr.P.C. before the learned Magistrate. The petitioner has, without dispute purchased a demand draft for the cheque amount and has tendered the same before the civil court also. In these circumstances, I can find no reason why the learned Magistrate should not permit the petitioner to appear through pleader at all stages of the proceedings. The petitioner can file appropriate application under Section 205 Cr.P.C. To consider and entertain that application, her personal presence need not be insisted.

Appropriate orders must be passed on such application under Section 205 Cr.P.C. by the learned Magistrate.

(R. BASANT)
Judge

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